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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON THE POSSIBLE INTRODUCTION OF THE ENTITLEMENT FOR FORMER GOVERNEMENT MEMBERS TO RESUME THEIR PARLIAMENTARY SEAT IN UKRAINE

by

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1. According to Art. 78(1) of the Constitution of Ukraine, “National Deputies of Ukraine exercise their powers on a permanent basis”. Art. 78(1) lays down that “a National Deputy of Ukraine shall not have any other representative mandate, be in the civil service, hold any other paid offices, carry out gainful or business activity (with the exception of teaching, scientific, and creative activities), or to be a member of the administration/governing body of a profit-seeking enterprise or organization”. Art. 78(3) states that “requirements concerning the incompatibility of the deputy’s mandate with other types of activity are established by law”.

2. Art. 81(2) para 5 states that the “powers of a National Deputy of Ukraine shall terminate prior to expiration of his or her term in office in the event of … his or her failure, within twenty days from the date of the emergence of circumstances preventing him or her from fulfilling a requirement concerning incompatibility of the deputy’s mandate with other types of activity, to remove such circumstances”.

3. Art. 120(1) of the Constitution states that members of the Cabinet of Ministers do not have the right to combine their official activity with other work, except teaching, scholarly and creative activity outside of working hours.

4. The provisions referred to in Art. 78(3) of the Constitution are included in the Law on the Status of People's Deputies. Art. 3(1) of this law provides that:

> “*members of parliament shall have no right to be members of the Cabinet of Ministers or heads of central executive authorities.*”

According to Art. 4(6) of the same law,

> “*the powers of National Deputies shall be prematurely terminated in cases of infringement of the requirements laid down in Art. 3(1).*”

5. It could be argued that a Cabinet Minister’s position is not included in the incompatibilities defined by Art. 78(2) of the Constitution, while it is neither a representative mandate nor a position in the civil service. It could be added that the incompatibility between a National Deputy’s mandate and a Cabinet Minister’s position affects in such a fundamental manner the relationship between main constitutional bodies that it should be regulated at the level of the Constitution and not in an ordinary law. Correspondingly, it could be argued that “work” in Art. 120(1) does not refer to “work” as a National Deputy.

6. However, the Constitutional Court of Ukraine has in 2002 given a decision according to which Art. 3(1) and Art. 4(6) are in compliance with the Constitution. According to the summary of the decision, the Court argued as follows: “Article 78.1 of the Constitution provides that people's deputies of Ukraine exercise their authority on a permanent basis: that is, throughout the deputy's time in office, his or her activities in the parliament (Verkhovna Rada) shall be deemed professional work on a permanent basis. Article 120.1 of the Constitution states that members of the Cabinet of Ministers do not have the right to combine their official activity with other work, except teaching, scholarly and creative activity outside of working hours. The legal opinion of the Constitutional Court is … that any work which is to be performed ‘on a permanent basis’ cannot be combined with the holding of an individual office with a state or local self-government authority that is also to be carried out on a permanent basis, in particular a position as the head of an executive authority. The combination of the office of deputy with

activity as a local council member holding no managing office in the relevant council, where these competences are not exercised on a permanent basis, does not contradict the Constitution."

7. In the present constitutional situation, the decision of the Constitutional Court must, of course, be followed. However, if the solution adopted in the Law on the Status of People's Deputies is considered politically feasible, it should in the future be included in the Constitution as an explicit provision.

8. The feasibility of such a provision, emphasizing the separation of the Parliament and the Government, can be doubted in a constitutional system which has adopted the principle of parliamentarianism.

9. Art. 85(1) para 12 of the Constitution has been interpreted as allowing for the dismissal of an individual minister by the National Assembly. Such an interpretation could be contested by arguing that the term "officials" employed in the provision on the power of dismissal does not refer to Cabinet Ministers at all and that the dismissal of Cabinet Ministers is exhaustively regulated by Art. 87, which only allows a vote of no-confidence in the whole Cabinet of Ministers.

10. The possibility of a vote of no-confidence in an individual minister does not in itself contradict any democratic standards. Thus, provisions on such a possibility can be found in the constitutions of many established parliamentary democracies. It can, however, be argued that the possibility of dismissing individual ministers may add to the general political instability, especially in a so-called new democracy.

11. The present Constitution does not allow for a former minister's resuming his or her mandate as a National Deputy. Art. 81(2) of the Constitution refers to the "termination" and not to the "interruption" of the Deputy's mandate. Because of the explicit wording of Art. 81(2), a change of the legal situation is possible only through amending the Constitution. If the incompatibility between the mandate of a National Deputy and the office of a member of the Cabinet of ministers is in general retained, the parliamentary features of the system should be enhanced by allowing former ministers to resume their mandates as deputies after the termination of their offices as ministers.